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Vol. II

SUPPLEMENTAL TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
APPELLANT,

vs.

NATIONAL SURETY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

FILED FEBRUARY 11, 1936.

SUPREME COURT OF THE UNITED STATES

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VOL. II.

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[fol. 1] [Caption omitted.]

[fol. 2] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE, AT NASHVILLE

CS:MW.

Davidson Equity.

INTERNATIONAL STEEL & IRON COMPANY

vs.

NATIONAL CONSTRUCTION COMPANY et al.

PETITION OF INTERNATIONAL STEEL & IRON COMPANY, FOR AMEDMENT OF OPINION, etc.—Filed Jan. 15, 1936

Comes International Steel & Iron Company, petitioner, and respectfully shows to the Court, as follows:

That this cause came to this Court from the Court of Appeals of the State of Tennessee, for the Middle District, upon the petition of National Surety Company and the petition of International Steel & Iron Company for writs of certiorari because of errors complained of in the holding of the Court of Appeals, both of which petitions were granted by this Court and jurisdiction was assumed by decree in Minute Book 37, page 258. That the cause was set down for oral argument by the Court and such argument was heard on the 14th day of May, 1934, and thereupon the cause was taken under consideration by the Court. That after the case was taken under consideration the Supreme Court of Tennessee ordered and directed reargument upon [fol. 3] certain specific grounds mentioned and set out in the order for reargument, which was entered July 14, 1934, in Minute Book 37, page 306, which order is as follows:

"This cause is set down for reargument, particularly upon the constitutionality, construction and applicability of Chapter 80, Acts of 1929, and it is so ordered."

That in response to the foregoing order of the Court petitioner, International Steel & Iron Company, prepared and filed a brief in this cause on February 25, 1935, which brief set out the contentions of International Steel & Iron

Company with respect to each of the questions designated by the Court, and said brief is now a part of the record and the papers in the cause.

In said brief the petitioner expressly contended that Chapter 80 of the Acts of 1929, if construed by the Court to be retroactive and applicable, was invalid and in violation of Section 10 of Article I and also the Fourteenth Amendment of the Constitution of the United States of America. This insistence was set out and contained in said brief, as will appear from the records and papers in this cause, in the following words, to-wit:

"Federal Question Involved.

"If the Court should be of the opinion that the Legislature intended the Contract Surety to be released when a refunding bond is executed under the provisions of Chapter 80 of the Acts of 1929; and should further be of the opinion that the aforesaid Act is applicable to the case at bar, we submit that Chapter 80 of the Acts of 1929 would violate [fol. 4] Section 10, Article I, and the 14th Amendment of the Constitution of the United States.

"Section 10, Article I of the Constitution of the United States, provides as follows:

" 'No State shall enter — any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; Make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.'

"The foregoing provisions of the Federal Constitution have consistently been construed to prohibit a State from passing a Statute which takes away the right to enforce a contractual obligation made prior to the passage of the Statute. The right of enforcement includes also the means in existence at the time the contract was made.

" 'Whether such repeal was effectual to deprive him of the process prayed, depended upon the question whether the judgment was founded upon a contract, the obligation of which the State is prohibited from impairing. By the

obligation of a contract is meant the means which at the time of its creation, the law affords for its enforcement.'

State of Louisiana v. Police Jury, etc., 111 U. S. 716, 28 L. E. 574.

"The restrictions imposed by the Federal Constitution, in the sections above referred to, are so universally accepted that we deem it unnecessary to quote further decisions in support of our position.

"If in the decision of this case the contingencies arise which make this question pertinent, we respectfully ask the Court to make an express decision with respect to this Federal question."

[fol. 5] That the cause was again set for oral argument and heard before this Court on the 25th day of February, 1935, and that in said oral argument this petitioner insisted and relied upon its foregoing contention with respect to the Federal question involved and urged upon the Court that said Chapter 80 of the Acts of 1929, if construed to be retroactive and applicable to the cause, would impair the obligation of the contract between the petitioner and National Surety Company and would violate Section 10 of Article I of the Constitution of the United States of America.

That this Court rendered its opinion in the cause on April 6, 1935, and that in so doing the Court announced from the bench that, in accordance with the request of counsel for International Steel & Iron Company, it had specifically considered and decided the Federal question involved in the cause, to-wit, the question of whether or not as construed and applied in the cause Chapter 80 of the Acts of 1929 was a violation of Section 10, Article I, of the Constitution of the United States, and that the Court had reached the conclusion that said Chapter 80 of the Acts of 1929 did not violate Section 10, Article I, of the Constitution of the United States of America.

That the petitioner, International Steel & Iron Company, has prayed an appeal to the Supreme Court of the United States for the purpose of having it review the decision of this Court with respect to said Federal question, and that [fol. 6] upon the filing of the record in the cause in the Supreme Court of the United States, National Surety Company filed a statement in opposition to jurisdiction, and said Supreme Court of the United States now has under

consideration the question of whether or not it should take jurisdiction of said cause on appeal and said cause was set for oral argument in said United States Supreme Court on January 9, 1936, under an express reservation of the question of jurisdiction, said argument being limited to the question of jurisdiction.

At the hearing aforesaid the United States Supreme Court indicated a doubt as to the jurisdiction of that Court upon appeal for the reason that the written opinion of this Honorable Court, filed herein on April 6, 1935, omitted to state clearly and unequivocally the decision of this Court with respect to petitioner's contention upon the Federal question, it being suggested by the Supreme Court of the United States that this Court, after construing said Chapter 80 of the Acts of 1929 to be retroactive and applicable to the controversy, further held that such construction of Chapter 80 of the Acts of 1929 would not bring that statute into any "constitutional difficulty", and further stated that the "constitutional rights" of petitioner were not infringed, but that this Court omitted in its opinion to refer specifically to the claimed constitutional rights of petitioner under section 10 of Article I of the Constitution of the United States of America, so that as a result of said omission some doubt had arisen in the mind of the Supreme Court of the United States as to whether this Court had reference to the Constitution of the State of Tennessee or the Constitution of the United States of America.

[fol. 7] Your petitioner shows that its contention made in response to the order of reargument aforesaid was specifically that said Chapter 80 of the Acts of 1929, if held to be retroactive and applicable, was in violation of the petitioner's Federal rights, to-wit, those protected by the above mentioned section of the Constitution of the United States and that this Court did in fact expressly adjudicate said Federal question, and announced its decision thereon in open court at the time the opinion was rendered, and that the doubt which has arisen is the result of the omission on the part of the Court to specifically state in its written opinion that the constitutional question referred to was the one raised by the petitioner, to-wit, the alleged violation of Section 10, Article I, of the Constitution of the United States of America.

Petitioner avers that this Court did in fact consider and decide the specific question of whether or not said Chapter

80 of the Acts of 1929, as construed and applied by this Court in its opinion, was a violation of Section 10, Article I, of the Constitution of the United States and announced its decision upon said question orally from the bench, but that through inadvertence and oversight the written opinion of the Court filed in the cause omitted to specifically recite and state such consideration and decision of said Federal question.

Because of this situation and the doubt expressed by the Supreme Court of the United States upon argument on jurisdiction aforesaid, petitioner has moved the United States Supreme Court for a continuance and a postpone-
[fol. 8] ment of the further consideration of the question of jurisdiction on the appeal in this cause in order that your petitioner might file this petition in this Court for an amendment, for a more specific statement, or a certification to show appropriately the basis of its determination of the cause, and to show that the Federal question was briefed and argued before this Court, and actually determined by this Court in this cause. Said Supreme Court of the United States granted said continuance and postponement and has allowed your petitioner a period of two weeks within which to apply to this Court for the purpose aforesaid with a view of having this Court amend its opinion aforesaid so as to contain a more specific statement showing that the Federal question above referred to was considered and decided by the Court in this cause and to certify its decision with respect to said Federal question so as to show that said Federal question was briefed and argued before this Court and actually determined by this Court in this cause.

Premises considered, your petitioner prays:

1st. That it may be allowed to file this petition in this cause for the purposes herein above set out.

2nd. That the opinion of this Court in this cause, rendered on April 6, 1935, be amended so as to specifically and unequivocally show that this Court ordered a reargument of the cause by the decree hereinabove referred to, and that one of the specific grounds upon which this Court directed re-argument to be made was the question arising under the
[fol. 9] Constitution of the United States as aforesaid, and that in response to said order for reargument International Steel & Iron Company filed a brief expressly raising said Federal question and contending that said Chapter 80 of

the Acts of 1929, if construed to be retroactive and applicable, would be in violation of said petitioner's rights under Section 10, Article I, of the Constitution of the United States of America; that said contention was argued and presented orally on behalf of said petitioner before this Court and that this Court in fact considered and decided said Federal question and was of opinion that said Chapter 80 of the Acts of 1929 was not a violation of the petitioner's constitutional rights under said Section 10, Article I, of the Constitution of the United States, and that an order be now entered by the Court in this cause correcting and remedying the errors growing out of the omission by this Court to clearly show its consideration and decision of the Federal question in its written opinion aforesaid, and amending said opinion for such purposes.

3rd. That this petition and all orders made in response thereto and all proceedings, including all orders made pursuant to the prayer hereof, be duly certified as required by law as a part of the record in this cause, to be filed in the pending appeal in the United States Supreme Court.

4th. That petitioner have such other, further and general relief as it may be entitled to under the equities of the cause.

International Steel & Iron Company, by Cecil Sims, Louis Leftwich, Attorneys.

[fol. 10] *Duly sworn to by Louis Leftwich and Cecil Sims. Jurat omitted in printing.*

I accept service of the foregoing petition, on this 15 day of January, 1936.

Chas. C. Trabue, Attorney for National Surety Company.

[fol. 11] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ANSWER OF NATIONAL SURETY COMPANY TO PETITION FILED WITH THIS COURT IN THE ABOVE CASE ON JANUARY 15, 1936 —Filed Jan. 16, 1936

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Tennessee:

Respondent, for answer, respectfully represents:

I

The petitioner prays this court to amend its opinion rendered herein on April 6, 1935.

Respondent is advised that, if the opinion is a part of the record, and to the extent that it is a part of the record, it can only be revised upon an application for that purpose filed during the term at which the opinion was rendered (Tennessee Code 1932, sec. 8980), and that while clerical mistakes or mistakes apparent upon the face of the record may be thereafter corrected (Ib. sec. 8722), the amend-
[fol. 12] ment here sought was neither clerical nor apparent on the face of the record.

There is nothing whatever in the record to show that complainant ever invoked the constitution of the United States. On the contrary, it had sued on the Act of 1929 and had claimed in the Chancery Court, Court of Appeals and in this Court that the Act was applicable to this case.

II

Respondent did not understand that the decision of this court was based solely on a constitutional question, whether state or federal. This court said in its opinion that the view that it took of the matter did not bring the Act of 1929 "into any constitutional difficulty."

There was a statutory bond under the Act of 1917 and another statutory bond under the Act of 1929. This court held in effect that no one could recover on both bonds. That was a matter of interpretation and that holding was true whether the 1929 Act was applicable or not.

Complainant sued on both bonds, with notice, made explicitly in respondent's answer, that the taking of the later bond might operate to discharge the earlier bond. But complainant proceeded and got judgment on the 1929 statutory bond and received and appropriated a large sum of money under that bond, something under $40,000.

This court found and stated in its opinion that complainant had filed its claim "according to subsection (e) of chapter 80 of the Acts of 1929" and that it had sued on [fol. 13] the 1929 statutory bond and recovered from it some $40,000.

Since under the opinion of this court no claimant had the right to recover on both statutory bonds, and since complainant had exhausted the benefits of the 1929 statutory bond, it reasonably followed, as respondent believes, that there could be no recovery on the 1917 bond. Else complainant would be given greater rights than any litigant whose rights arose prior to the Act of 1929 or any litigant whose rights arose subsequent to the Act of 1929.

While this court did not in terms say that complainant could not sue and recover on the 1929 statutory bond and after doing so be heard at the end of the suit to say that that statute was inapplicable, respondent believed that the above statement and findings of this court were determinative of the applicability of the Act.

III

In the recent argument in the United States Supreme Court on January 9th that court asked counsel for complainant (appellant) when and where appellant had invoked the constitution of the United States.

Complainant had sued and recovered on the statutory bond under the Act of 1929 and had never claimed or indicated in any pleading or assignment of error that the Act was not applicable or that it impaired complainant's contract rights.

In the recent case of Lynch vs. New York ex rel. Pierson, 293 U. S., 52, the United States Supreme Court, in stating [fol. 14] that jurisdiction on appeal from a state court "cannot be founded on surmise", went on to say: "Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record."

An examination of the pleadings, assignments and briefs will show that the sole question in the case up to the time of complainant's second brief in this court was as to the interpretation of the 1929 Act. The right to claim that it was inapplicable was entirely personal and could be waived. Complainant had waived any right to object by suing on the Act and exhausting its benefits.

There is no reference in the petition, assignments of error and brief of complainant in this court (in all 53 pages) to any clause of the federal constitution. On the contrary, complainant was asserting the applicability of the 1929 Act, as (on page 52) where it is argued in conclusion that the Court of Appeals erred in holding that the Act of 1929 was not applicable to the case.

Since the 1929 amendatory act could have only one meaning, respondent believed that the consequence of the court's interpretation of that act was that the suing and recovery by complainant on the refunding bond precluded recovery on the bond under the 1917 Act.

IV

The history of the case in this court is this:

Both sides filed petitions for certiorari. There was no reference in the petitions, assignments and accompanying briefs to any constitutional question or to any claim or right under the state or federal constitution.

[fol. 15] On the contrary, complainant had sued and recovered on the Act of 1929.

There was an oral argument in this court in the spring of 1934. In the course of the argument it was suggested by one of the members of the court that respondent had not filed a petition for certiorari so as to entitle it to question the reasoning of the Court of Appeals. It was pointed out that respondent had filed such a petition.

Thereafter the court directed a re-argument and this was had in the spring of 1935.

In February, 1935, complainant filed a brief in this court for the first time suggesting that the Act of 1929 was not applicable to the case. This was four and a half years after complainant had filed its bill suing on the 1929 bond, and over two years after it had recovered on the 1929 statutory bond and collected the proceeds of it, and over a year after it had filed its assignment and brief in this court

maintaining—as it had in the two lower courts—the applicability of the 1929 Act and arguing its interpretation.

Respondent understands the opinion of the court in this case as settling (a) that where only the 1917 Act is applicable recovery is on the contract bond, and (b) that where the 1929 amendatory act is applicable and a refunding bond is taken, recovery is on the refunding bond, and (c) that neither the original statute nor the amendatory statute nor the two of them together authorize a recovery on both bonds.

The interpretation of the acts was, of course, wholly [fol. 16] within the right and power of this court and did not involve any federal question.

If this court should think it proper to interpret its opinion, respondent respectfully asks the court to clarify its opinion as to whether a claimant may conformably with its opinion recover on the bond provided by the statute of 1929 and receive its proceeds, and then recover also on the bond provided by the statute of 1917 and receive its proceeds.

The judgment of this court was in fa-or of respondent. The appeal to the United States Supreme Court was after, as respondent believed, it was too late to ask this court for an interpretation of its opinion.

National Surety Company, by Trabue, Hume & Armistead, Solicitors.

Duly sworn to by Charles C. Trabue. Jurat omitted in printing.

[fol. 17] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER SUPPLEMENTING OPINION—Filed Feb. 3, 1936

This cause came on to be heard on this February 3, 1936, upon the entire record and more especially upon the petition of International Steel & Iron Company seeking an amendment to the opinion of this court heretofore filed on April 6, 1935, and the answer of parties adversely inter-

ested, upon consideration whereof it is ordered by the court that the statement following be recorded as supplementary to and part of its original opinion herein, filed herein on April 6, 1935, as aforesaid.

In stating in said opinion that chapter 80 of the Public Acts of Tennessee for the year 1929, as construed by the court, did not bring that Act into any "constitutional difficulties" or infringe any "constitutional rights" of this petitioner, this court intended to express the opinion that the said Act so construed did not impair the obligation of [fol. 18] contracts in violation of Section 20 of Article I of the Constitution of Tennessee and the contract clause of Section 10 of Article I of the Constitution of the United States and did not violate the law of the land clauses of Section 8 of Article I and Section 8 of Article XI of the Constitution of Tennessee and the due process clause of the Fourteenth Amendment to the Constitution of the United States—these constitutional objections having been interposed by petitioner to the construction given chapter 80 of the Acts of 1929 by this court.

[fol. 19] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

PETITION OF NATIONAL SURETY COMPANY FOR A REHEARING—Filed Feb. 4, 1936

Respondent, National Surety Company, respectfully asks for a rehearing of this application for the following purpose:

The court in its response handed down on February 3, 1936, says—

"these constitutional objections having been interposed by petitioner to the construction given chapter 80 of the Acts of 1929 by this court."

We respectfully ask the court to add to its ruling so as to show when and where these constitutional questions were

raised, since, as stated in our answer upon this application, the Supreme Court at Washington—

"asked counsel for complainant (appellant) when and where appellant had invoked the constitution of the United States."

Complainant's petition on this application asked this court to amend its opinion so as to show—

"that this court ordered a reargument of the cause * * * and that in response to said order for reargument International Steel & Iron Company filed a brief expressly raising said Federal question. * * *"

[fol. 20] Respondent respectfully asks that there be incorporated in the ruling of this court a statement to the following effect:

No federal question was raised by complainant in its assignment of error and brief in support thereof filed in this court in February, 1934, and that the time and manner in which complainant raised the federal question was in a second brief filed by it in this court in February, 1935.

If the above statement is in any respect not correct, respondent asks that the court incorporate a correct statement showing when and where the federal question was raised.

If the order of this court is to be certified to Washington, respondent asks that the pleadings upon this application be included in the record.

National Surety Company, by Trabue, Hume & Armistead, Solicitors.

Duly sworn to by Charles C. Trabue. Jurat omitted in printing.

I have handed Mr. Sims a copy of this petition.

Chas. C. Trabue.

[fol. 21] [File endorsement omitted.]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER FURTHER SUPPLEMENTING OPINION—Filed Feb. 6, 1936.

This cause came on to be further heard on this February 6, 1936, upon the petition of National Surety Company that the court amplify the order herein made on February 3, 1936, so as to show when and where the constitutional questions, referred to in said order of February 3, 1936, were raised upon the hearing of this cause. Notice of this petition having been given to parties adversely interested, upon consideration of the same, the court adds the following as further supplement to and a part of its original opinion filed herein April 6, 1935.

On the first hearing of this cause in this court, all of the judges were not present. Those present were not agreed as to the proper disposition of the matter. The case was accordingly set down for re-argument. The Court of Appeals had held that chapter 80 of the Acts of 1929 was inapplicable to the controversy but had decided the case ad- [fol. 22] versely to the International Steel & Iron Company on other grounds. By order of this court this cause was set down for re-argument upon "the constitutionality, construction and applicability" of chapter 80 of the Acts of 1929. Prior to the re-argument counsel for International Steel & Iron Company filed a second brief in this court raising the constitutional questions referred to in the previous order of February 3, 1936, against the construction adopted by this court of chapter 80 of the Acts of 1929. The assignments of error and brief accompanying the petition for certiorari filed in this court by International Steel & Iron Company to review the action of the Court of Appeals did not raise any federal question.

Upon petition of counsel for National Surety Company it is ordered that "the pleadings upon this application" to amend the original opinion of this court be included in the transcript of the record for the Supreme Court of the United States.

[fol. 23] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 24] Judge's certificate to clerk omitted in printing.

[fol. 25] Clerk's certificate to judge omitted in printing.

[fol. 26] [File endorsement omitted.]